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In The Supreme Court of the United States

FORD MOTOR COMPANY,
Petitioner,

v.

JUAN RAMON ROMO, ET AL.,
Respondent.

On Petition for a Writ of Certiorari to the California Court of Appeal, Fifth Appellate District

BRIEF OF AMICUS CURIAE MERCEDES-BENZ USA, LLC IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

Mercedes-Benz USA, LLC ("MBUSA") is a U.S. importer and distributor of Mercedes-Benz automobiles.[1] Mercedes-Benz automobiles have long enjoyed a reputation for pioneering safety technology. For example, Mercedes-Benz automobiles were the first to offer, or to offer as standard equipment, features such as

- Safety door locks (1949)
- Safety body with "crumple zones" (1951)
- Seat belt anchor points as standard equipment (1961)
- Collapsible steering wheel columns (1967)
- Safety head restraints (1968)
- Three-point seat belts (1968)
- ABS antilock braking system (1978)
- Supplemental restraint system consisting of driver airbag, seat belt pretensioners and knee bolsters (1981)
- Passenger front airbag (1988)
- Side-impact airbag (1995)
- Electronic stability program (1995)
- BabySmart child safety seat recognition system (1997)
- Head curtain window airbag (1998)

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[1] Pursuant to Supreme Court Rule 37.3, letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court. This brief was funded entirely by Mercedes-Benz USA, LLC and was written entirely by its counsel.

Christof Vieweg, HIGHLIGHTS OF AUTOMOTIVE TECHNOLOGY: EVERYTHING ABOUT MERCEDES PASSENGER CARS 21-23 & *passim* (1999). Many of these features appeared in Mercedes-Benz vehicles well before they appeared in the vehicles of other manufacturers, and some of this technology remains unique to Mercedes-Benz vehicles. *Id.*

Nonetheless, like Ford and other automobile companies, MBUSA faces a constant risk of new products liability lawsuits throughout the United States. Plaintiffs frequently seek punitive damages. They allege that their automobile should have had a safety feature it did not have, or that it had a safety feature it should not have had, or that a safety feature did not do what it should have, or even that the safety feature failed to do something it was never intended to do.

MBUSA, like many others who manufacture or sell products, is vitally concerned that there be rational guidelines for punitive damage awards; otherwise such awards threaten to "punish" in an extraordinary manner any defendant unlucky enough to draw an impassioned jury – or appellate panel. Where appellate courts refuse to intervene in the face of such an enormous award – as the California Supreme Court did here – or, even worse, where an appellate court actively intervenes to reinstate such an award that was thrown out by the trial judge – as the California Court of Appeal did here – there is a desperate need for constitutional guidance by this Court.

SUMMARY OF ARGUMENT

Corporate defendants must frequently rely on appellate courts to invoke the rule of law when runaway juries fashion outlandish punishments for perceived misdeeds. Trial judges are often unwilling, or feel too constrained, to rectify the problem. Here, to the contrary, the trial court attempted to correct an improper result that it perceived to be the result of jury misconduct, passion and prejudice, by ordering a new trial. It was instead a runaway appellate court that reinstated and endorsed an unprecedented $290 million punitive award. In doing so, the

appellate court brushed aside constitutional considerations identified by this Court that the California court simply felt did not apply to personal injury actions.

The *Romo* court's reasoning is particularly troubling to companies like MBUSA selling products to the public that involve cutting edge technology, often with inherent safety tradeoffs. Although Mercedes-Benz vehicles lead the field in safety technology, their manufacturer or distributor should not be exposed to a heightened risk of a jury finding that they consciously modified, or failed to modify, their product in a way that they allegedly knew created risks to certain users. Yet the *Romo* appellate court's reasoning, which the California Supreme Court left intact, holds that the United States Constitution has little if any role to play in protecting such a manufacturer or distributor from potentially enormous punitive liability for decisions that, in other contexts, bring them praise as industry leaders.

As Ford's petition explains, the *Romo* court is not the only court to take the limited view that this Court's precedents on the constitutionality of punitive damages apply only to, or differently in, cases involving pure economic harm. Pet. 10-11. *See also Sand Hill Energy, Inc. v. Ford Motor Co.*, 83 S.W.3d 483 (Ky. 2002), *pet. for cert. pending sub nom. Ford Motor Co. v. Estate of Tommy Smith*, No. 02-1096 ($15 million punitive damages verdict in products liability case reinstated by Kentucky Supreme Court, which rejected due process arguments that verdict was excessive because, among other things, "[i]t would be impossible to overstate the degree of harm" to decedent).

Although nothing about their reasoning suggests that the Court meant to draw a line between economic loss and personal injury in identifying due process limitations on punitive damages, the Court apparently needs to make clear that due process considerations apply with equal force to all punitive damages awards. Otherwise, we will continue to see decisions like *Romo*, and this Court will continue to see petitions for certiorari spawned by ever more enormous punitive awards.

THE *ROMO* DECISION

Romo is a products liability case involving a 1978 Ford Bronco, purchased used in 1992, that rolled over on the highway in 1993 while the driver was attempting to avoid collision with another vehicle. Pet. App. 2a. Three occupants of the Ford truck were killed and three were injured. *Id.* Plaintiffs sued Ford, alleging that Ford improperly designed the roof so that it failed to adequately resist the crush forces in this accident. *Id.* at 26a-28a.

It was undisputed that, at the time the plaintiffs' vehicle was manufactured, there were no federal regulations requiring a stronger roof. Pet. App. 26a. It was also undisputed that, when the federal government instituted roof strength standards several years later, this vehicle would easily have passed those standards. *Id.* It was also undisputed that other manufacturers at the time (indeed almost all) used similar roof construction designs and that there remain many vehicles on the road designed to be driven with no roofs at all (i.e., convertibles), and which do not have roll bars or any other device designed to protect the occupants in a rollover crash. *Id.* at 29a-30a. Finally, it was undisputed that, even though these vehicles have been on the road for more than two decades, Ford has never been "penalized in any case for [sic] punitive damages arising from the design of the 1978-1979 Bronco." *Id.* at 36a.

The jury nevertheless ultimately held Ford liable, returning a verdict for approximately $6 million in total compensatory damages and a whopping $290 million in punitive damages. Pet. App. 3a. The vote to award punitive damages was 9 to 3 – the minimum necessary. *Id.* at 10a. Juror declarations obtained after the verdict strongly suggested that two of the jurors were influenced to vote for punitive damages based on information they had acquired outside the courtroom. *Id.* at 6a-8a. In one case it was information she had heard second-hand about a "60 Minutes II" program concerning fires in Ford Mustangs. *Id.* at 6a-7a. In the other case it was a dream, among other things, that persuaded her that "saving babies was more important [than] the need to follow the law." *Id.* at 7a-8a.

Based on these affidavits and his experience presiding over the entire trial, the trial judge granted Ford's motion for a new trial. Pet. App. 10a-11a. The trial judge found that "[j]uror misconduct occurred by virtue of the injection of external evidence and influences, prejudgment of the case and a refusal to follow the law." *Id.* at 10a. The trial court noted the borderline 9-3 vote on "malice" and pointed out the very high "clear and convincing evidence" standard for imposing punitive damages. *Id.*

The California Fifth District Court of Appeal reversed the trial court and reinstated the jury's punitive damages award. Pet. App. 2a. Acknowledging the misconduct of the two jurors in question, the court found this bias cured by the trial court's and jury foreperson's admonitions to follow the law. *Id.* at 19a-20a. As to the $290 million punitive damage award, the court characterized the evidence as establishing that Ford, as an institution, must have been aware of the shortcomings of the 1978 Ford Bronco roof, and that corporate failure to act on that awareness constituted "malice." *Id.* at 22a-32a.

The court was untroubled by the size of the award, rationalizing it largely on the grounds that Ford is "a huge company with enormous monetary resources." *Id.* at 36a. In an attempt to distinguish this Court's jurisprudence on punitive damages, the California court asserted that "the award here cannot be compared to cases 'involving a business fraud resulting only in economic harm.'" *Id.* at 38a. According to the California court, Ford's conduct was particularly "reprehensible" because it "involved mass production and marketing of the dangerous vehicle purely for defendant's economic betterment." *Id.*

Ford sought discretionary review by the California Supreme Court. By a 4-3 vote, that court refused to even consider whether there was something fundamentally wrong with this unprecedented California verdict. Pet. App. 47a.

WHY THE PETITION SHOULD BE GRANTED

Something radically wrong happened at this trial, and the California appellate court, rather than affirming the trial judge's corrective order, instead became a partner in the jury's reckless folly. A decision like this in *Romo* will only further discourage trial judges from seeking to remedy plainly excessive jury awards. All of corporate America, and many individual citizens as well, must fear the implications of verdicts like this, which threaten severe liability for decisions that, in other contexts, would be viewed as entirely appropriate and often highly beneficial. This is the problem faced by companies like MBUSA, which use advanced safety technology that saves many lives and prevents serious injuries, but that also sometimes has inherent risks.

A. *Romo* Threatens Corporate Defendants with Potentially Unlimited Punishment Even for Innovative Safety Technology

Companies like MBUSA, which pride themselves on the innovative nature of the products they sell, are particularly at risk that a jury, and indeed even an appellate court, will view such innovations as evidence of "conscious disregard" for the safety of consumers. This is so whether the innovative change fails to prevent injury or arguably harms someone. Plaintiffs will even argue that an innovative change serves as evidence the defendant "consciously disregarded" consumer safety by not introducing the innovation earlier. Note that the *Romo* appellate court specifically cited Ford's subsequent strengthening of the Bronco roof as evidence supporting the huge punitive damages award because it demonstrated that Ford was aware its earlier vehicle was "structurally inadequate" but did nothing to "remedy" this inadequacy in earlier model vehicles. Pet. App. 35a.

Airbag technology is the perfect example. Mercedes-Benz vehicles were technological and market leaders in the field of airbags. They began to include driver's side front airbags in production vehicles in 1981, becoming standard equipment in all Mercedes-Benz vehicles by 1992. Vieweg, HIGHLIGHTS OF

AUTOMOTIVE TECHNOLOGY at 22. This was well before airbags were first required by the National Highway Traffic Safety Administration ("NHTSA") in the late 1990's. 49 C.F.R. § 571.208 S4.1.5.3. Mercedes-Benz vehicles have continued to add new and innovative airbag technology, without being required to do so, including passenger airbags, side airbags in the front and rear seats, and head curtain airbags that come down from the ceiling. Vieweg, *supra.*

Like many components in motor vehicles – and indeed in many products generally – airbags involve a safety tradeoff. Airbags have been proven to save many lives and to prevent serious injuries, and that is why NHTSA now requires them in all U.S. passenger vehicles. 49 C.F.R. § 571.208 S4.1.5.3 (requiring driver and front passenger airbags in model year 1998 vehicles). But airbags do not always prevent injury, and in certain circumstances they can themselves injure and even kill people. There is no way to eliminate these risks while maintaining the ability of airbags to do their job. NHTSA is well aware of these risks and has made a conscious decision to require airbags in vehicles despite their dangers. *See* Federal Motor Vehicle Safety Standards, Occupant Crash Protection, 65 Fed. Reg. 30680, 30681 (May 12, 2000) ("As of April 1, 2000, NHTSA's Special Crash Investigation (SCI) program had confirmed a total of 158 fatalities induced by the deployment of an air bag."); Air Bag On-Off Switches, 62 Fed. Reg. 62406, 62425 (November 21, 1997) (discussing "the safety benefits, risks and tradeoffs associated with air bags").

Nonetheless, like other motor vehicle manufacturers and distributors, MBUSA has been sued for injuries allegedly related to airbags. On the one hand, the plaintiff might allege that the airbag was defective because it failed to deploy, and that the injury would and should have been prevented by the airbag. On the other hand, the plaintiff might claim that he or she was injured because the airbag did deploy, and that the injury would have been prevented if the airbag had been designed to deploy differently, or if the vehicle did not have an airbag. MBUSA is particularly at risk for the last

type of claim because Mercedes-Benz vehicles had airbags long before they were required.

B. The *Romo* Decision Allows Massive Punitive Damages Even If No Particular Individual Ever Made a "Malicious" Decision

Indeed, the California Court of Appeal's decision did not even require evidence that anybody in particular made a "malicious" decision on behalf of the corporate defendant to include or not include safer technology. According to the court, "maliciousness" can be attributed to a corporation even if no one in charge of the corporation is ever shown to have acted wrongfully. The court admitted there was no evidence in *Romo* that any "particular committee or officer of the corporation acted on a particular date with 'malice.'" Pet. App. 24a.

The court nonetheless held that a plaintiff may satisfy the "managing agent" requirement of California Civil Code section 3294(b) through "evidence showing the information in the possession of the corporation and the structure of management decisionmaking that permits an inference that the information in fact moved upward to a point where corporate policy was formulated." Pet. App. 25a. The court regarded Ford as a "fictional monolith," explaining that it had difficulty imagining "how corporate malice could be shown in the case of a large corporation except by piecing together knowledge and acts of the corporation's multitude of managing agents." *Id.*

This utterly amorphous standard excused the plaintiffs from proving any actual malice on the part of anyone, and instead allowed the jury to award punitive damages because it concluded that "the design and production of the [product] was the despicable conduct." Pet. App. 25a. Especially where jurors are free to consider the punitive issue in light of television programs and stories of nightmares, and trial judges are instructed that they should deny new trials despite such flagrant misconduct, the *Romo*

malice standard threatens to lift any due process limitations on punitive damages, at least where personal injuries are involved.

Those who sell trendsetting safety technology – like MBUSA – should not have to worry that their efforts to improve safety might result not just in unwarranted liability, but also in multi-million or even billion dollar punitive awards. Yet the *Romo* decision offers a roadmap for reaching precisely this result.

C. This Court Should Clarify that Fundamental Constitutional Protections Bar Outrageous Punitive Awards Like that Permitted Here

The California appellate court's opinion is inconsistent with all that this Court has recently taught regarding assessment of the constitutionality of punitive damage awards. *See BMW of North America, Inc. v. Gore*, 517 U.S. 560 (1996); *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001). While insisting that Ford's conduct was "reprehensible" – despite Ford's compliance with industry and government standards – the California court improperly dispensed with the two *BMW* factors that inconveniently militated against the award's constitutionality.

First, the disparity between the punitive and compensatory award (even before it was reduced by the trial court) was enormous – a 59:1 ratio – and the court of appeal acknowledged that this factor "weigh[ed] in favor of excessiveness." Pet. App. 39a. But it chose to ignore this reality, asserting that "wrongful death compensatory damages do not fully reflect the harm to the victims," *id.* – as if this Court might not have anticipated, when it formulated its factors, that wrongful death cases offered one likely context for their application.

Second, the court deemed a "comparison with civil fines for similar conduct" to be inappropriate, claiming that (1) this factor should only apply when the conduct, if committed by an individual, could *not* result in imprisonment, while (2) Ford's

conduct, if committed by an individual, "could result in substantial imprisonment." Pet. App. 39a. No such concepts are found anywhere in this Court's jurisprudence; indeed, the Court specifically held in *BMW* that the automotive distributor should not have been subjected to "a punitive sanction that is *tantamount* to a severe criminal penalty." *BMW of North America v. Gore*, 517 U.S. at 585 (emphasis added).

The California court's constitutional analysis was seriously deficient and apparently driven by an agenda to reinstate an outrageous award. If left standing, it encourages other like-thinking courts to permit similar injustices, paying nothing more than lip service to this Court's constitutional jurisprudence on punitive damages.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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